

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Comments Regarding)	
Auction No. 35)	WT Docket 02-276
Licensing)	
)	

COMMENTS OF BLACK CROW WIRELESS, L.P.

Black Crow Wireless, L.P. (“Black Crow”) by its attorneys, and pursuant to the Commission’s Public Notice, hereby submits its comments in response to the Commission request for comments with respect to the proposals set out in the September 12, 2002 Public Notice (the “Notice”).¹

As set forth below, Black Crow urges the Commission to permit any Auction No. 35 applicant that was the high bidder for any licenses subject to the NextWave litigation and Urban Comm proceedings (the “Licenses”) to selectively “pick and choose” the Licenses that it desires to acquire, and to provide it with a time frame within which to select that is equivalent to the time frame within which the Commission could re-auction the Licenses. In addition, in light of the severely depressed wireless marketplace, Black Crow also urges the Commission to further discount the winning bids, in the amount of 40%. This discount is necessary to place the cost for the Licenses in line with their value today and to assure that the associated spectrum lies fallow no longer.

¹ Public Notice, FCC 02-248, WT Docket No. 02-276, September 12, 2002.

I. INTRODUCTION

Black Crow is a PCS Broadband licensee, holding five (5) licenses. All such licenses were awarded pursuant to Auction No. 35. Black Crow participated in Auction No. 35 as a Designated Entity. The Commission's action granting Black Crow its licenses evidences Black Crow's status as such. In addition, Black Crow was the high bidder for twelve (12) additional licenses, all of which remain pending.

This status establishes Black Crow as being particularly well qualified to comment in this proceeding. The focal issue in the proceeding is how to address the unprecedented circumstances in the marketplace, and in the courts, that are here present, all of which impact on the economic viability of the Licenses. In this regard, the Commission has repeatedly acknowledged that small businesses are particularly vulnerable to economic hardships caused by circumstances such as are here present.

II. BACKGROUND

Black Crow will not burden this proceeding by presenting a lengthy dissertation regarding the challenges facing the wireless industry. It is suffice to say that this is self-evident. Moreover, in its Notice, the Commission has already recognized this in stating: "the state of the capital markets for entities, including the applicants, engaged in the provision of wireless services, as well as other telecommunications services, has continued to decline rapidly." Notice, at 3. That recognition is neither surprising nor startling. It mirrors largely what the Chairman told Congress two and one-half months ago. Then Chairman Powell explained that:

[c]learly, the telecommunications industry is riding on very stormy seas. This is an industry where nearly 500, 000 people in the United States alone have lost their jobs and approximately \$2 trillion of market value has been lost in the last two years. By some estimates, the sector is struggling under the weight of \$1 trillion in debt. And most segments have seen precipitous declines in stock value: The long distance industry is down 68% year-to-date, the wireless

industry is down 71%, and ILECS are down 40%. Clearly there are serious stresses on this important industry.²

The Chairman also explained to Congress that:

It is estimated that telecommunications companies worldwide are carrying \$1 trillion in debt, much of which will never be repaid ... capital markets are retrenching, and the telecommunications companies in need of financing to support their capital-intensive enterprises are suffering.³

The Commission's comment in the Notice is also fully consistent with what the industry and academia have previously recognized and explained to the Commission. See e.g. the prior submission of Verizon Wireless arguing for relief to Auction No. 35 high bidders.⁴ If there were any question here – and there can be no genuine one – reference need only be made to the equity values of the publicly traded entities who are the largest wireless carriers in the nation, most of whom participated in Auction No. 35. Those values have dropped by at least 50% in this calendar year.

The Commission has made it clear that in instances such as this, the country's general economic malaise, and the problems with the wireless industry in particular impact directly upon "the values of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations". Notice, at 3. The Commission has also recognized that, in circumstances such as this, the Commission must consider matters such as the state of the capital market. See *Id.*, at 3, where the Commission explains that "[C]oncerns about the state of the

² Written statement of Michael K. Powell, Chairman, Federal Communications Commission on "Financial Turmoil in the Telecommunications Marketplace: Maintaining the Operation of Essential Communications", before the Committee on Commerce, Science, and Transportation, United States Senate, July 30, 2002, 6-7.

³ *Id.* at 11.

⁴ See "The Economic Benefits of Permitting Winning Bidders to Opt Out of Auction 35", J. Gregory Sidak, August 26, 2002; See also Correspondence of August 15, 2002, addressed to Chairman Powell and signed by fourteen economic academicians and consultants, including Mr. Sidak, urging the same relief. See also, Letter of August 13, 2002, from Thomas E. Wheeler, President and CEO of CTIA, to Chairman Powell, requesting that the Commission "dismiss" the pending applications of Auction No. 35's high bidders.

capital markets **must** be balanced against [the need to maintain the integrity of the auction process”. (Emphasis added.)

III. RELIEF REQUESTED

At a minimum, the Commission should provide Auction No. 35 high bidders the option to “pick and choose” which of the Licenses they will retain rights and obligations to acquire. In this regard, it is critical that the Commission provide ample time in which applicants can make its election. High bidders should also be afforded an opportunity to acquire their Licenses at a price that more accurately reflects today’s market values.

A. Providing High Bidders with an Option to Pick and Choose Which Auction No. 35 Licenses They will Acquire Would serve the Public Interest.

At the core of the Commission’s overall responsibilities is the need for its actions to further the public interest; and the heart of its auction program is the need for the Commission to promptly deliver to high bidders the value for which they bid. Here, rigid adherence rules would not permit the Commission to make either of its required “deliveries”, due both to the considerable passage of time since the conduct of the auction and the unprecedented downward pricing changes in the wireless industry since the close of Auction No. 35. Under such circumstances, neither the Commission’s overall obligations to act in the public interest nor its auction delivery obligations can be met. The Commission’s Notice, while not committing to the provision of any relief, tacitly concedes the need for such.

It is in this context that the Commission must be responsive to the developments that have made routine performance impossible. Providing winning bidders with an opportunity to pick and choose which of their Licenses they will acquire is an important first step in the process. Such relief will serve the public interest in a number of ways. First, it will relieve high bidders of some portion (or all of) the potential obligations, now in the range of \$16 billion dollars, that

currently overhang the capital markets. That alone will permit more efficient borrowing by those carriers; free up funds for facility build-out and for research and development, and remove the cloud of uncertainty that has paralyzed major portions of the wireless industry for the last year and a half.

The Commission may have to wait at least two years to learn if it can deliver the licenses sold in Auction No. 35. Thus, even if the Commission prevails in its current litigation involving the Licenses, it may well be that long before the Commission could re-auction the Licenses to other parties. Accordingly, winning bidders should have that length of time in which to determine which of their Licenses they want to acquire.⁵ This would facilitate a reasoned decision making process without delaying in any way the use of spectrum.

B. High Bidders Should have an Option to Acquire Their Licenses at 60% of Bid Amount.

Providing high bidders with an option to acquire their Licenses is not sufficient to rectify the existing problems with the industry and specifically with Auction No. 35. Many applicants will not have any genuine option to buy their Licenses at full value. This is because their Licenses are not worth nearly what they were at the close of Auction No. 35, and therefore funding that may have once been available to purchase them no longer exists. And for those larger carriers, who are financially capable of acquiring their Licenses, they may determine that economically it makes no sense to do so, and thus they may not buy them.⁶

Were the high bidders not to acquire their Licenses, because the Commission provided them with an option not to do so, because such relief is judicially imposed, or because many high bidders make the rational economic determination that their interest (or that of their investors to

⁵ The Commission should of course, return to any high bidders the remaining upfront deposit as soon as that high bidder determines that it does not want to acquire any particular License.

whom they have fiduciary obligation) simply argue against acquisition, the spectrum would remain fallow for several years. (This is in addition to the near decade that the spectrum has already laid fallow.) Clearly, this would not serve the public interest. Thus, the Commission should take reasonable steps to increase the likelihood of the Licenses being acquired, and discounting their purchase price as set forth above appears to be an appropriate one.

C. Grant of Meaningful Relief to Auction No. 35 High Bidders would Neither Undermine the Auction Process nor Exceed Commission Authority.

The Commission need not be concerned that any discounting would either constitute a potential windfall to high bidders, or an unfair penalty to the government. After all, it is beyond question that the discounting would only bring the acquisition price into line with what the spectrum is worth today. Moreover, the government would receive full value of the spectrum, and the highest price for which many buyers would actually acquire the spectrum.

Nor need the Commission be concerned that such action may somehow undermine the integrity of the auction process. It is the Commission who has been unable to deliver the auction product for the last one and one-half years. In addition, in the Notice, the Commission has already recognized, quite properly, that there MUST be a recognition of market realities. Lastly, revising the auction process post close of the auction is nothing new. In PCS itself, this was done on a band-wide basis in 1998.⁷ Thus, such action is clearly within the purview of the Commission.

⁶ This may well be the case even if the Commission were not to grant any relief here, for many of the high bidders are not financially viable to the point where they could be forced to either pay for what they bid or to pay the associated penalties for non-acquisition.

⁷ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order, FCC 97-342, 121 FCC Rcd 16436 [9 CR 1100] (1997) (Second Report and Order); Amendment of the Commission's Rules Regarding Installment Payment financing for Personal Communications Services (PCS) Licenses. Order on Reconsideration of the Second Report and Order, FCC 98-46, 13 FCC Rcd

Lastly, the Commission need not be concerned that relief would somehow exceed its authority. *See e.g.*, 47 U.S.C. § 4(I). That provision unequivocally provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such order, not inconsistent with this Act, as may be necessary in the execution of its functions.” *See also, Mobile Telecommunications Technologies, Inc. v. FCC*, 777 F.3d 1399 (1996), where the D.C. Circuit affirmed the Commission’s expansive interpretation of the authority conveyed to it by Section (4)(I). Based on the equity considerations here present, the only way in which the Commission can meet its obligation to make telecommunications services available to all would be to grant the relief sought herein. Further action would serve the public interest, convenience, and necessity.

IV. CONCLUSION

For all the foregoing reasons, Black Crow urges the Commission to grant the relief sought herein.

Respectfully submitted,

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8345 [11 CR 873] (1998) (First Reconsideration Orders. See Also Part 1 Third Report and Order.